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Okay to Terminate Employee for Violating No-Alcohol Provision of Return to Work Agreement, Says Third Circuit

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In *Ostrowski v. Con-way Freight, Inc.*, No. 12-3800, 2013 WL 5814131 (3d Cir. Oct. 30, 2013), the U.S. Court of Appeals for the Third Circuit affirmed that an employer may discharge a driver sales representative ("DSR") who suffers from alcoholism for violating a return to work agreement ("RWA") that prohibits the use of drugs or alcohol. This alert analyzes the Court's holding and compares the outcome with that of *A.D.P. v. ExxonMobil Research & Engineering Co.*, 428 N.J. Super. 518 (App. Div. 2012), a recent decision in which the New Jersey Appellate Division found a similar RWA facially discriminatory under New Jersey's Law Against Discrimination (for more on *A.D.P.*, check out our prior alert).

Background

Con-way, a global freight corporation, employed Thomas Ostrowski as a DSR, a position which is subject to strict government safety regulations with regard to drug and alcohol screening. While employed with Con-way, Ostrowski took a leave of absence under the Family and Medical Leave Act ("FMLA") to seek treatment in an alcoholism rehabilitation program. When Ostrowski returned to work, he signed an RWA that required him to abstain from alcohol or drugs for the duration of his employment. Within a month of signing the agreement, however, Ostrowski suffered a relapse and subsequently sought additional treatment. For violating the terms of the RWA, Con-way terminated Ostrowski's employment.

Ostrowski filed a complaint in Pennsylvania district court, alleging that, by terminating his employment, Con-way (1) discriminated against him on the basis of his disability, alcoholism, in violation of the Americans with Disabilities Act ("ADA") and (2) retaliated against him for requesting medical leave in violation of the FMLA. Ostrowski also claimed that the no-alcohol requirement found in the RWA violated the FMLA because it had the effect of interfering with the exercise of his FMLA rights.

Holding

To state a viable claim of disability discrimination under the ADA, a plaintiff must demonstrate that he is a qualified individual with a disability and that he "has suffered an adverse employment action because of that disability." *Turner v. Hershey Chocolate U.S.*, 440 F.3d 604, 611 (3d Cir. 2006). An employer does not violate the ADA, however, when there is "legitimate non-discriminatory reason" for the employment action. *Shaner v. Synthes*, 204 F.3d 494, 500 (3d Cir. 2000).

According to the Court, Ostrowski's ADA claim failed because the RWA did not preclude disabled employees (*i.e.*, alcoholics) from working for Con-way, but merely regulated their conduct (consuming alcohol). In reaching this conclusion, the Third Circuit noted that "numerous courts" have recognized that employers do not violate the ADA merely by entering into RWAs that impose employment conditions different from those of other employees. The Court also dismissed Ostrowski's retaliation claim under the FMLA, finding that Ostrowski's termination was for breach of the RWA, not requesting medical leave. And, given that the RWA was requested in accordance with government regulations, the Third Circuit determined that Con-way had not otherwise discouraged Ostrowski from exercising his FMLA rights.

Takeaway

Given the different outcomes in *Ostrowski* and *A.D.P.*, at first glance the two cases may appear to be at odds with another. Yet, the facts in *A.D.P.* were quite different. In that case, the Appellate Division concluded that the employee's alcoholism did not pose a "materially enhanced risk of substantial harm" in the workplace that would probably cause "injury." Nor, according to the court in *A.D.P.*, was there evidence to suggest that the employee's work performance had been adversely affected by her alcoholism. Here, however, the Appellate Division might have agreed that a driver such as Ostrowski posed a sufficient risk to safety and work performance, so as to uphold the RWA.

Accordingly, the nuance upon which the decisions in *Ostrowski* and *A.D.P.* turned, should underscore that employers cannot adopt a one-size-fits-all drug and alcohol policy. Rather, discipline for employee behavior which stems from alcoholism or other addiction must include an individualized examination of the employee's work performance and/or the risks posed to safety of the workplace. To avoid liability, employers must remember to perform such individualized assessments, reasonably accommodate their alcohol- or drug-disabled employees who are otherwise qualified, and refrain from adverse actions unless they are based on legitimate, nondiscriminatory reasons.

If you have any questions or concerns regarding the Third Circuit's decision or your workplace alcohol and drug policy, please contact your Proskauer lawyer.

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